UNDERSTANDING OSHA:

A Look at the Agency's Complex Legal & Political Environment

By TIMOTHY G. PEPPER

The ancient Chinese reportedly had a curse for those who prefer tranquility: "May you live in interesting times." Whether by curse or choice, OSHA has certainly had an interesting year. The agency's final ergonomics standard continues to generate controversy—not to mention lawsuits—and the dust has yet to fully settle over its infamous opinion letter on home offices. Although the confusion and criticism generated by OSHA's actions have only recently gained widespread attention, safety professionals are well aware that confusion and criticism have plagued OSHA since its inception.

The agency's existing standards can frustrate even the most-experienced safety engineer or lawyer. To further complicate matters, just when a law finally seems settled, OSHA may issue an opinion letter or adopt an enforcement policy that changes everything. Or, the agency may propose a new standard that sparks acrimonious debate and inevitably leads to court battles.

Press coverage of OSHA's recent adventures has not answered a basic question raised by this state of affairs: How does OSHA make law and why does the agency do it that way? This article attempts to answer that question by showing that OSHA operates within a complex matrix of legal, political and historical constraints. Understanding this context will give safety practitioners insight into the creation of the laws that have such profound impact on their profession.

IN THE BEGINNING

The Occupational Safety and Health (OSH) Act of 1970 is the source of OSHA's authority. The act created the agency itself and laid the foundation for every standard that has followed. The act itself contains no standards. Congress recognized that it would be unable to legislate effectively in such a technical field, so the act simply created the agency and gave it the authority to establish and enforce occupational safety and health standards. Unfortunately, the procedural requirements imposed by the act put the agency in an awkward situation from which it has never fully recovered.

The OSH Act was not passed in a vacuum. In 1970, Congress faced strong, conflicting pressures that found their way into the act's procedural requirements. Congressional leaders perceived the immediate need for mandatory safety and health standards ("Senate Report No. 1282" 5182), yet business-friendly legislators opposed giving OSHA the authority to write binding standards without going through the same rigorous public-participation process used by other federal agencies to make law (Queener 328). The resulting compromise satisfied enough legislators to ensure passage of the act, but left OSHA in a precarious position.

THE FIRST TWO YEARS

Congress addressed the need for immediate action by authorizing OSHA to establish binding standards with no public participation for a period of two years. However, this sweeping power came with a major caveat—OSHA could only adopt "national consensus standards" and existing federal standards, and it had to adopt them verbatim.

A national consensus standard is one adopted and promulgated by a nationally recognized standards-producing organization, such as the American National Standards Institute (ANSI), under procedures through which interested parties have reached substantial agreement. An existing federal standard is one already created by another federal agency. Congress believed adoption of these standards *without change* would satisfy the business community's concerns because this community had already influenced their content.

In addition, Congress authorized OSHA to cite employers immediately for violations of the act's General Duty Clause, which requires employers to eliminate "recognized hazards" in the absence of a specific standard covering that particular hazard.

THE AGENCY ON ITS OWN

After the initial two-year period, OSHA had the authority to establish a new standard or modify an existing one only

through the public-participation process—called "notice-and-comment rulemaking," a process commonly used by federal agencies. This compromise was designed to make the act more palatable to employers; in fact, however, it unexpectedly perpetuated the problems created by the wholesale adoption of existing standards.

THE OUTCOME

In 1971, OSHA adopted the bulk of its standards from existing consensus and federal standards. This action achieved Congress's goal of immediate action, but it saddled the agency with a problem it has yet to overcome. Simply stated, national consensus standards were never meant to be law; they were created as nonbinding suggestions that are not coordinated with each other and, in the author's opinion, many were not drafted with the care and precision given to legislation.

In 1976, Robert Moran, then chair of the Occupational Safety and Health Review Commission, addressed this problem:

> . . . because of the rush in which the initial standards were adopted, we got a lot of would-be regulations that didn't fit the act's definition of what they should be and what they should do. The initial package (and virtually all of it is still around) contained in profusion standards which were:
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> 1) not binding, not enforced and not written in terms [that are] amenable to enforcement;
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> 2) not exclusively concerned with worker safety (that is, the safety of equipment, buildings, consumers, the general public and workers was intermingled);
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> 3) not applicable to industry as a whole, or in some cases even to all parts of a single segment of an industry;
>
> 4) not without conflict and [various] inconsistencies;
>
> 5) not specific enough so that an ordinary businessman or employee could understand them (Moran 19-20).

Furthermore, many of the standards in place merely stated that employers "should"—rather than "shall"—comply. Yet, the agency adopted these standards verbatim per Congress's direction, thus leaving employers to wonder whether they were enforceable.

As a result, OSHA was forced to begin with an unwieldy, inconsistent and disjointed body of standards to enforce. Even Lane Kirkland, president of the AFL-CIO in 1980 and a staunch defender of occupational safety legislation, admitted that "this hodgepodge collection of standards and OSHA's early efforts to enforce them probably did more to damage the initial acceptance of the entire program than any other single action" (Kirkland 730-31). It must be reiterated that this state of affairs was not entirely the agency's fault—Congress had left it no choice.

That is what OSHA faced in 1971—and still faces today. The agency cannot create, modify or eliminate any standard without going through the lengthy notice-and-comment process. Given its finite resources, OSHA has focused its efforts on adopting new standards instead of revising the standards adopted during its first two years of operation. Although the agency was able to revoke a large number of the more-inconsequential adopted standards via its "standards deletion project" of 1997-98, many remain in force today ("Preamble to Revocation Notice" 726-27).

MAKING A NEW RULE

Notice-and-comment procedures are designed to ensure that all interested stakeholders—employers, employees (often via unions) and safety and health professionals—have an opportunity to participate in the creation of a technically accurate, balanced, effective standard. This is often easier said than done.

Notice-and-comment rulemaking consists of four main phases. First, OSHA writes a standard. This can be a lengthy process—one that continues to grow as more layers of governmental oversight are added. A proposed standard can be developed internally or in cooperation with a committee of affected parties through a process known as "negotiated rulemaking."

Next, OSHA formally proposes the standard and publishes all scientific data used to develop it. This is a crucial step—and mistakes can be costly. For example, in 1991, a federal appeals court refused to enforce part of OSHA's lead standard because some data used to determine economic feasibility were not properly disclosed to the industry (*American Iron and Steel Institute v. OSHA*).

The comment period allows the public to examine the proposal and supporting data. Anyone may submit written comments to OSHA, and the agency holds public hearings, which allows interested stakeholders to provide live testimony and question agency officials and other witnesses. The duration of these hearings varies, depending on the proposed standard's scope, complexity and origin.

For example, standards developed through negotiated rulemaking and other noncontroversial standards often generate little hearing testimony. Conversely, the embattled ergonomics standard required nine weeks of public hearings. More than 700 witnesses testified, and hearing transcripts totaled 18,337 pages; an additional 50,000 pages of written comments were received after the hearings concluded ("OSHA's Ergonomics Chronology").

Next, OSHA examines all comments received and evaluates their merit. The magnitude of this task also varies, depending largely on the level of employer response. For example, the agency's 1987 standard on methylenedianiline (MDA) was developed through negotiated rulemaking and received little public comment. Public hearings took only two days.

In contrast, standards developed internally or that face stiff opposition (such as the ergonomics standard) generate a large volume of criticism which requires a major evaluation effort. Based on its review, OSHA must then amend the proposed standard to reflect any legitimate concerns raised—or offer a rational explanation for not doing so.

Finally, OSHA publishes the final standard and explains how it addressed comments received. This explanation allows the public to see that the agency has met its statutory mandate to evaluate and consider all comments. Any parties not satisfied with the outcome can mount a legal challenge alleging that OSHA failed to properly execute its procedural responsibilities. The final ergonomics rule contained hundreds of pages of such explanation—and legal challenges are already underway.

FILLING IN THE GAPS

Clearly, creating a new standard is a major undertaking. OSHA likely made the correct decision when it elected to not engage in rulemaking to fix every problem that accompanied its wholesale adoption of standards in 1971. Instead, to address ambiguities and contradictions present in many of those standards, the agency has chosen to rely on informal enforcement guidance and letters of interpretation ("opinion letters"). These documents guide compliance officers and inform employers how the agency might handle ambiguities. Furthermore, OSHA simply does not enforce some of the adopted standards. For example, no employer has been cited for the use of "closed front" toilet seats (former 29 CFR 1910.141(c)(3)(iii)).

GOING TOO FAR?

Few would object to OSHA's use of discretion when the stakes are limited to toilet seats. However, the agency's use of informal documents and enforcement strategies has not always been so successful when the stakes are higher. The most-notorious example of an opinion letter gone awry is the December 1999 letter asserting jurisdiction over home offices. That letter attempted to address an ambiguity in the OSH Act itself, not a standard. Regardless of the legal merits of the agency's position (which it quickly withdrew), OSHA made a politically unwise choice.

The political response to OSHA's home office letter illustrates a primary employer concern about use of informal guidance documents. Simply stated, critics contend that through these documents, the agency

Life & Times of OSHA's PPE Standard

OSHA's general industry standard for personal protective equipment (PPE), which requires employers to "provide" appropriate PPE, was adopted from a national consensus standard in 1971 (29 CFR 1910.132(a)). The confusion surrounding it mirrors that surrounding the agency as a whole.

To begin, the word "provide" does not indicate who must pay for PPE. OSHA attempted to resolve this issue through opinion letters, but those letters were inconsistent and did little to solve the problem. OSHA then issued a compliance directive in 1994 (Directive STD 1-6.6) that required employers to pay for PPE, but the Occupational Safety and Health Review Commission invalidated that directive because it arbitrarily conflicted with OSHA's previous position (*Secretary of Labor v. Union Tank Car Co.*). Finally, OSHA commenced the notice-and-comment rulemaking process in March 1999—a process that continues to drag on.

Simply stated, the so-called "national consensus" on PPE that OSHA attempted to codify in 1971 has produced nearly 30 years of confusion. To some extent, this typifies the history of the agency.

attempts to circumvent its rulemaking burdens. A senior vice president of the National Assn. of Manufacturers recently told a congressional committee that "officials at OSHA seem reluctant to use the legal process of amending regulations because it is too difficult" (Baroody). The committee subsequently offered these comments about OSHA (and other executive branch agencies):

> Regrettably, the committee's investigation found that some guidance documents were intended to bypass the rulemaking process and expanded the agency's power beyond the point at which Congress said it should stop. Such "back door" regulation is an abuse of power and a corruption of our constitutional system" ("Non-Binding" 1).

Recent agency actions have only fueled the fire. For example, a federal court of appeals struck down the agency's cooperative compliance program in April 1999 because the program was not adopted through the notice-and-comment process (*Chamber of Commerce v. OSHA*). The agency had argued that it was merely a procedural enforcement strategy, but the court concluded that the program imposed new burdens on employers and should have been subjected to the public-participation process.

Other examples of alleged "back door" rulemaking include OSHA's multiple attempts to change regulations covering arborists. In 1998, OSHA issued an opinion letter indicating that its logging standard—which had never before been applied to tree trimmers—would, indeed, govern commercial tree-trimming companies. The National Assn. of Arborists (NAA) threatened to sue and OSHA retracted the letter.

Then, in 1999, the agency issued another opinion letter stating that it was unilaterally changing the type of fall protection to be worn by tree trimmers working from aerial lifts. NAA again threatened to sue and OSHA again retracted its letter. Although these incidents affected only a small number of employers, they vividly illustrate the critics' allegations.

The ergonomics standard has caused similar concerns. In the author's opinion, the standard is one of the most-vague standards OSHA has ever adopted. It leaves the agency with tremendous discretion to shape its actual impact on industry through enforcement strategy. In other words, OSHA's information guidance documents will likely play a large role in the practical meaning of the standard. This will allow the agency to work out details while bypassing the rigors of notice-and-comment rulemaking. However, it will also expose OSHA to more accusations of "back door" rulemaking. (Ironically, it may actually be unions making these accusations if OSHA eviscerates the standard under the Bush Administration.)

CONCLUSION

The OSH Act forced OSHA down a difficult path. The agency was forced to adopt in-place standards in the beginning and is required to use notice-and-comment rulemaking to create new standards. Many critics would contend that OSHA attempts to dodge these requirements through the use of informal guidance documents—and one can cite enough examples to make that a debatable proposition.

Regardless of how this debate is resolved, the fact remains that OSHA's actions are often the result of the peculiar context in which the agency operates. Safety practitioners who understand this context are better able to understand how and why OSHA makes the decisions that shape the safety profession. ■

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